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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 177.

VINCENT CICENIA,

Petitioner,

vs.

R. WILLIAM LAGAY, Superintendent of New Jersey State Prison Farm at Rahway, New Jersey,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

Opinion Below.

The opinion of the United States Court of Appeals, Third Circuit, is reported in 240 F. 2d 844 (1957).

Counter-statement of Questions Involved.

1. Does a prisoner have an absolute right under the Constitution (Sixth Amendment) to have the aid and assistance of counsel between the time of his arrest and arraignment, and particularly during the time he is under police questioning and investigation and while he is giving a voluntary confession?
2. Where the prisoner is permitted to consult with his counsel immediately after the confession and is thenceforth represented by counsel throughout every step of the criminal proceedings, that is, at the arraignment which is held without unreasonable delay (the following morning), at the arraignment on the indictment, at the time he enters a plea of non vult to the indictment, and at the time of sentence, can it be said that the accused was denied due process of law?
3. Where the confession was given voluntarily under State law standards as to voluntariness, and it was obtained in compliance with requirements of fundamental fairness under the Fourteenth Amendment, can it be said that the accused was denied due process because he was not allowed a pre-trial inspection of his confession (the denial of inspection being in compliance with State law) upon the claim that the denial of inspection and the denial of counsel between arrest and arraignment were conjunctive factors in the alleged denial of due process?
4. Where the confession was never used against the accused at any trial because he entered a plea of non vult to the indictment, and the plea was entered upon the advice and with the consent of his counsel who was present, can the accused thereafter attack the confession in habeas corpus proceedings upon the mere claim that he was induced to enter the non vult plea because of the existence of the confession?

Counter-statement of the Case.

Vincent Cicenia, the petitioner herein, was granted a writ of certiorari by this Court to review the judgment of the United States Court of Appeals for the Third Circuit, dated January 7, 1957, which affirmed the judgment of the United States District Court for the District of New Jersey, dated July 17, 1956, denying petitioner's application for a writ of habeas corpus (R. 123, 19).

Following is a brief summary of the antecedent events and proceedings in the case.

On the night of March 17, 1947, at about 8:30 P. M., one Charles Kittuah, the owner of a small dry-goods store in the northerly section of Newark, New Jersey, was found shot and killed in his store under circumstances indicating he had been the victim of an armed robbery.

There were no eye witnesses to the crime; the perpetrators had fled the scene; and the crime remained unsolved until December, 1949 (2 years and 9 months later).

Solution of the crime came about in the following manner.

The petitioner, Vincent Cicenia, Armando Corvino, and John DeMasi, were residents of Orange, a suburb of Newark.

Corvino, whose wife had given the Orange police information concerning her husband's involvement in the Kittuah murder, was the first to be taken into custody on December 17, 1949.

As the result of information given by Corvino, the Orange police were alerted to apprehend DeMasi and the petitioner Cicenia.

On the morning of Sunday, December 18, pursuant to a police call at petitioner's home, petitioner Cicenia presented himself at Orange police headquarters, and he was immediately taken into custody and delivered to the Newark police for questioning and investigation.

Shortly thereafter, the third suspect, John DeMasi, was taken into custody and also held for questioning in Newark police headquarters.

Petitioner was first questioned at about noon by Lieutenant Joseph A. Kinney and Detective Carlton B. Norris of the Homicide Squad (R. 95), when petitioner was questioned "briefly and for about 20 or 25 minutes" (R. 96).

The second time petitioner was questioned was two or three hours later, and the questioning lasted "forty-five minutes to an hour," when the petitioner "changed his story after he was confronted by DeMasi" (R. 96).

A Prosecutor's detective, George E. Meagher, who arrived at headquarters after 1:00 P. M., at first questioned DeMasi from about 1:35 to 2:20 P. M., after which he questioned the petitioner from about 3:20 P. M. until about 4:10 P. M. (R. 102).

As a result of the second questioning by Detective Meagher, petitioner gave a detailed oral admission of the commission of the crime and the participation therein by each of the three suspects (R. 103-104).

Thereafter the oral admissions of the three were reduced to writing. Lieutenant Kinney took DeMasi's written statement; Detective Norris took Corvino's; and the Prosecutor's Detective Meagher took the petitioner's written statement, the three statements being taken at about

the same time, and within close proximity of one another (on the 4th floor of Newark police headquarters).

Petitioner's written statement consisted of seven pages. It took Detective Meagher about three hours to write (from 5.17 to 8.10 P. M.). After its completion, the statement was read to petitioner; he himself read it aloud; after which he signed each and every page (R. 105).

Thereafter a disinterested citizen-witness (Mr. Taylor) inquired of petitioner as to the police treatment and petitioner said it was "good or very good or words to that effect" (R. 98).

At the time of the taking of his statement, petitioner was 21 years old, and he had had the benefit of a grammar school education as well as two years of vocational school training (R. 66-67).

The written statement was a voluntary one; and it was not the product of unreasonably lengthy questioning, or threats of violence or promise of reward.

On the afternoon of December 18, 1949, at about 2:00 P. M., Mr. Frank A. Palmieri, an attorney, appeared at Newark police headquarters and requested to see the petitioner, Cicenia, stating he had been retained by the family to represent him.

The attorney was informed that the police and representatives of the State were then engaged in questioning the three men and otherwise investigating the crime, and that upon completion of the investigation the attorney would be able to see and consult with his client.

The investigation was concluded at about 9:30 P. M. at which time the attorney was immediately permitted to consult with his client (R. 27).

All three defendants were arraigned the following morning, December 19th, in the Magistrate's Court at which time petitioner was represented by his counsel; they were properly advised of their rights pursuant to the pertinent rule; and they were remanded to the county jail without bail pending action by the Grand Jury (R. 35-36).

The Essex County Grand Jury (1949 Term) returned an indictment against the three defendants charging that they "did wilfully, feloniously and of their malice aforethought kill and murder Charles Kittuah," etc. (R. 21).

On March 3, 1950, before trial of the indictment, counsel for petitioner, said Mr. Frank A. Palmieri, presented a motion before the County Judge, Hon. Joseph E. Conlon, requesting a pretrial inspection and suppression of petitioner's confession which he had given the police on December 18, 1949, and the motion was denied (R. 35-36).

An appeal was taken from said order of denial and the New Jersey Superior Court, Appellate Division, dismissed the appeal. (See *State* v. *Cicenia*, 9 N. J. Super. 135, App. Div. 1950) (R. 37-40).

On appeal to the New Jersey Supreme Court, the judgment of the Appellate Division was affirmed with modification, and it was held that a defendant does not have the absolute right to a pre-trial inspection of his confession or those of his co-defendants. (See *State* v. *Cicenia*, 6 N. J. 296, 1951.)

On March 26, 1951, the date fixed for trial of the indictment, all three defendants, represented by their individual counsel, offered pleas of *non vult* to the indictment, which was consented to by the prosecuting attorney and accepted by the Court (R. 53-57).

On April 18, 1951, the three defendants were sentenced to life imprisonment (R. 58-65).

In December, 1953, petitioner addressed a petition to the County Court for a writ of habeas corpus claiming therein that: (a) his arrest was an unlawful one; (b) there was an unreasonable delay in his arraignment; and (c) *that he had been denied counsel between the time of his arrest and arraignment* (one of the grounds advanced in his application in the District Court).

The Essex County Court granted to petitioner a writ of habeas corpus and petitioner was allowed a plenary hearing on January 21, 1955. At the conclusion of the hearing the court discharged the writ, holding that petitioner's claims were without merit.

On appeal, the Superior Court of New Jersey, Appellate Division, affirmed the County Court's dismissal of the writ of habeas corpus. The affirmance was dated July 11, 1955, but was not officially reported.

Petitioner thereafter moved before the Supreme Court of New Jersey for leave to appeal as an indigent from the judgment of the Appellate Division, and his motion was denied on September 12, 1955.

Petitioner thereafter applied to this Court for a writ of certiorari to review the New Jersey Supreme Court's denial, and this Court denied certiorari on December 12, 1955. (See *Vincent Cicenia* vs. *State of New Jersey*, 350 U. S. 925, 76 S. Ct. 215.)

Petitioner thereafter sought redress in the Federal courts by applying to the District Court for a writ of habeas corpus substantially upon the same grounds he had ad-

vanced in the State courts; namely, that his arrest and detention for slightly in excess of 24 hours, during a portion of which he was subjected to police questioning, was unlawful; that during the course of the police questioning he gave an involuntary written confession which his counsel was prohibited from inspecting before trial; and that these circumstances allegedly constituted a denial of due process of law.

After a full hearing in the District Court on April 24, 1956 (R. 65-123), the District Court, on July 17, 1956, dismissed the writ of habeas corpus (R. 19-20).

Thereafter, on January 7, 1957, the Court of Appeals affirmed the District Court's judgment of dismissal (R. 124).

In his Brief in his present appeal, petitioner discusses several points which we shall argue in the order presented.

Summary of the Argument.

We respectfully submit that:

1. Petitioner was not entitled, under the Federal and State Constitutions, to the aid and assistance of counsel while he was under police questioning and investigation after his arrest and prior to his arraignment.

2. The fact that under State law petitioner was not permitted to have a pre-trial inspection of his confession did not contribute to any alleged unfairness in the proceedings.

3. Where the confession was a voluntary one under State law and it was obtained, as shown by the record, in accordance with the requirements of fundamental fairness under the Federal Constitution; and where the confession was never used because petitioner entered a plea of non vult to the indictment voluntarily and understandingly upon the advice and with the consent of his counsel, there was no denial of due process.

ARGUMENT.

POINT I.

The denial of assistance of counsel while petitioner was under police questioning and investigation prior to his arraignment was not a violation of due process.

The gist of petitioner's argument under this point seems to be, briefly, that he was entitled to the assistance of counsel while he was under police questioning and during

the investigation of the crime, which was prior to his arraignment, and that such denial constituted a violation of due process under the Fourteenth Amendment, with which we cannot agree.

Following is a brief perspective of the factual situation.

On the morning of Sunday, December 18, 1949, in response to a call by the Orange police, petitioner surrendered to the Orange police at about 9:00 A. M. and at about 10:00 A. M. he was turned over to the Newark police for investigation.

Prior thereto, Armando Corvino, another of the suspects, who had been taken into custody by the Newark police, had implicated the petitioner in the crime and it was his disclosure which led to petitioner's apprehension and detention. The third suspect, John DeMasi, was taken into custody and brought to Newark headquarters about the same time as petitioner.

There was no questioning of petitioner until "About 12:15 or 12:30 P. M.," when Lieutenant Kinney of the Homicide Squad questioned him "briefly and for about 20 or 25 minutes" (R. 96). DeMasi was questioned "around 1:30 or thereabouts" (R. 96).

The only police officers who engaged in the questioning of the three suspects were Lieutenant Kinney, Detective Norris and Prosecutor's Detective Meagher.

The second time the petitioner was subjected to questioning was "about 3:15 or 3:30," when the officers "spoke to him for forty-five minutes to an hour," and, according to Lieutenant Kinney, "At that time Cicenia changed his story after he was confronted by DeMasi" (R. 96).

A County Prosecutor's detective, George E. Meagher, who arrived at headquarters after 1:00 P. M., first questioned DeMasi from "about 1:35 until the neighborhood of 2:20." Thereafter he "started to talk to Cicenia about 3:15 P. M." and continued the questioning "Until about 4:10" (R. 102).

As the result of this second period of questioning by Detective Meagher, after petitioner had been confronted by DeMasi, petitioner gave a detailed oral account of his participation in the crime as well as that of the other two men (See Meagher's testimony, R. 103-104).

After the oral admissions of the three suspects, the task of preparing and writing their individual confessions was assumed by the same three police officers who undertook the oral questioning, namely, Lieutenant Kinney, Detective Norris, and Prosecutor's Detective Meagher.

Lieutenant Kinney took DeMasi's; Detective Norris took Corvino's; and Prosecutor's Detective Meagher took the petitioner's written confession.

Detective Meagher commenced the writing of petitioner's confession "at 5:17 P. M.," and concluded it at "about 8:10 or thereabouts" (R. 105). It consisted of seven pages; and upon its completion, the detective read it to petitioner; the petitioner then read it aloud; and he signed each and every page (R. 105). Thereafter a disinterested citizen-witness (a Mr. Taylor) inquired of petitioner as to the police treatment of him, and he replied it was "good or very good or words to that effect" (R. 98).

At about 2:00 P. M., on December 18, an attorney, Mr. Frank A. Palmieri, appeared at police headquarters and

advised Lieutenant Cohen who was in charge of the desk on the third floor that he represented the petitioner and that he wanted to see the petitioner, but was refused; at about 4:00 P. M. he made a similar request of Detective Norris and was refused; and at 4:46 P. M., he made a similar request of Assistant Prosecutor Maurice J. McKeown, who had joined the police officers in the investigation but did not participate in the questioning, and the Assistant Prosecutor advised the attorney that he could see his client upon the completion of the investigation; and petitioner's attorney was permitted to see and consult with his client at about 9:30 P. M. (R. 23-27).

From the time his attorney was permitted to see him on the evening of December 18, petitioner was continually represented by his counsel throughout every step of the legal proceedings.

Petitioner was represented by his attorney the following morning, December 19, 1949, when he was arraigned before the Magistrate at about 11:00 A. M., and petitioner was properly advised of his rights in conformity with the New Jersey Rules of Practice and Procedure, and a plea of not guilty was entered for him. He was likewise represented by his attorney when he was arraigned upon the indictment. He was also similarly represented on March 26, 1951, when he retracted his plea of not guilty and entered a plea of non vult upon advice of his attorney; and again he was similarly represented on April 18, 1951, when the sentence of life imprisonment was imposed.

It always has been and it is still the established law of New Jersey that an accused's right to counsel contemplates the aid and assistance of counsel *for his defense at the trial,*

and not during the period between his arrest and arraignment. (*State* v. *Grillo*, 11 N. J. 173, S. C. 1952, cert. den. *Grillo* v. *State of New Jersey*, 345 U. S. 976, 73 S. Ct. 1123, 1953; *State* v. *Murphy*, 87 N. J. L. 515, 528-531, E. & A. 1915; *State* v. *Bunk*, 4 N. J. 461, 470, 1952, cert. den. 340 U. S. 839, 71 S. Ct. 25; *State* v. *Cole*, 136 N. J. L. 606, E. & A. 1949, cert. den. 334 U. S. 851, 68 S. Ct. 1503).

In *State* v. *Grillo, supra,* the New Jersey Supreme Court reaffirmed the rule that an accused is not entitled to consult with counsel "*during the police interrogation,*" when it said, page 180:

> "With respect to the allegations of denial of permission to consult counsel during the police interrogation, the former Court of Errors and Appeals has expressly determined this alleged constitutional question, denial of counsel during the period between arrest and arraignment and its effect on a confession obtained during that period, adversely to the contentions here presented by the defendants."

The New Jersey Supreme Court followed the principle firmly established by the former New Jersey Court of Errors and Appeals in *State* v. *Murphy*, 87 N. J. L. 515 (1915), where the specific question here involved had been squarely presented and determined; namely, whether the refusal to permit counsel to consult with an accused between the time of the latter's arrest and arraignment constitutes a denial of the constitutional right to aid and assistance of counsel.

In the *Murphy* case, *supra,* while the accused was in jail, the sheriff refused an attorney permission to see the accused until after the confession was made. At the trial,

defendant requested the trial judge to charge the jury that if they believed that the defendant had been denied the assistance of counsel they should consider the denial in appraising the credibility of the confession, which request was denied.

In sustaining the trial judge's denial of the request, the Court made the following significant statement (pp. 529-530):

> "The contention on behalf of the defendant is that he was denied a right under both the federal and state constitutions to be represented by counsel from the time of his arrest. The provisions in each of the instruments invoked on behalf of the defendant are the same.
>
> "The proposition advanced is novel. What infinite confusion would result if a criminal defendant could not be proceeded against without the assignment of counsel by an inferior magistrate, if the prisoner had retained none at the time of his arrest!
>
> "The constitution of the United States, by article 6 of the amendments, provides, *inter alia*, that in all criminal prosecutions the accused *shall enjoy the right* to have the assistance of counsel for his defense. 9 Fed. Stat. Anno. 324.
>
> "The contention that the defendant was denied a right under the constitution of the United States to be represented by counsel from the time of his arrest, in giving credence to the confession, is disposed of by the fact that the sixth amendment applies exclusively to the powers exercised by the federal judiciary and is not a limitation upon the powers of the states."

Further, the Court said (pp. 530-531):

"It is to be observed that the constitution does not provide that the defendant shall have the right to have assistance of counsel from the time of his arrest, but for the *defence*. Obviously, the word *defence*, as here used, means that a defendant is entitled to be represented and defended by counsel when put in jeopardy on his trial, and that his counsel shall have reasonable access to the prisoner for the purpose of preparing his defence. A criminal defendant at large on bail has this latter privilege to the full. By no stretch of the imagination can the provision be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether or not he shall confess. *Confession* is a thing entirely apart from *defence* upon a trial. This is evidenced every day by the pleas of guilty made by criminal defendants without the assistance of counsel to advise them thereon. A plea of guilty amounts to a confession in open court.

"The constitutional provision, whose protection is invoked, contemplates a criminal prosecution and provides for a speedy and public trial by an impartial jury, that the accused shall be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and (conjunctively) have the assistance of counsel for his defence. It clearly appears that the rights thus intended to be secured to a criminal defendant are rights arising from a criminal prosecution—that is, a trial upon an indictment. A prisoner making a confession is not confronted with any witnesses, at least never in the sense that they are examined in his presence, he can have no process for witnesses in his favor upon such an occasion, and, conse-

quently, he is not entitled to the assistance of counsel to save him from himself. That is done later by the trial court if the confession were unlawfully obtained."

In *State* v. *Bunk, supra* (certoriari denied 340 U. S. 839, 71 S. Ct. 25, 95 L. Ed. 615) it is stated (p. 470):

> "• • • the law over the years in this State has been that a person is only entitled to counsel to aid him in his defense, *not to save him from his own voluntary acts.*" (Emphasis supplied.)

In affirming the District Court's denial of a writ of habeas corpus, the Court below apparently felt constrained to permit the New Jersey rule on this question to be upheld under the circumstance unless, as the Court below stated, the New Jersey Supreme Court "reverses its holding" or this Court reverses the New Jersey Supreme Court (R. 124).

We respectfully submit that the conclusion of the New Jersey Court of Appeals in the *Murphy* case, *supra,* to the effect that an accused's constitutional right to the aid and assistance of counsel "*for his defence,*" relates to the *defense* of the accused if and when he is put to trial and not during the period between his arrest and arraignment or at the time he is being questioned and investigated by the police, is founded upon sound, logical reasoning.

The Sixth Amendment to the Federal Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

> crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

With a slight change of words, the New Jersey Constitution contains substantially identical provisions, as follows (Art. I, par. 10):

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

The provisions in both constitutions clearly refer to the *trial* of an accused in a criminal prosecution.

These are the specific rights given in connection with a criminal trial:

1. A speedy and public trial by an impartial jury;
2. To be informed of the nature and cause of the accusation;
3. To be confronted with witnesses against him;
4. To have compulsory process for obtaining witnesses in his favor; and
5. To have the assistance of counsel for his *defence*.

There is nothing in the section which refers directly or inferentially to the right to assistance of counsel from the

moment an accused is placed under arrest and questioned and investigated in connection with a crime committed.

When a criminal suspect is questioned by the police and is giving a confession, is he entitled to the confrontation of witnesses in the sense that they must be examined in his presence? Or, on such an occasion, is he entitled to process for obtaining witnesses in his favor? We think not.

The rights specifically set forth in the Sixth Amendment as well as in the State Constitution above referred to can have no other meaning than that an accused is entitled to have counsel represent and defend him "when put in jeopardy on his trial;" and that his counsel shall have reasonable access to him for the purpose of preparing and presenting his defense *at his trial.*

In his Brief, petitioner devotes nsiderable argument to the evil of "uncontrolled" and "prolonged" interrogation by the police which he claims can be curbed by giving to an accused the right to have his counsel present during the police interrogation, citing and quoting from *Haley* v. *Ohio*, 332 U. S. 596, and *Watts* v. *Indiana*, 338 U. S. 49 (B. 11).

In the instant case, the confession was taken not only in accord with the New Jersey rule of admissibility on the basis of voluntariness, but the methods used were in strict conformity with the constitutional requirements of "fundamental fairness essential to the very concept of justice," under the Fourteenth Amendment to the Federal Constitution.

Here there was none of the continuous, prolonged questioning and grilling by relays of police officers under con-

ditions and circumstances determined by this Court to be improper and oppressive such as prevailed in the above-cited cases.

The only officers who took part in the questioning of the petitioner as well as his two confederates were two detective members of the Newark Homicide Squad (Kinney and Norris) and the Prosecutor's Detective Meagher. The Assistant Prosecutor, Mr. McKeown, was in and about headquarters during the police questioning and investigation but he did not actively participate in any questioning.

The record does not support any contention of police brutality. At the hearing in the District Court, any claim of alleged threats or violence by the petitioner was abundantly contradicted by the police officers and county official who testified that petitioner had not been subjected to any force or violence or threats, or any physical discomfiture.

Petitioner, in his Brief, indulges in extensive discussion generally on the use of "Third Degree" methods (citing and quoting from Frank and Frank's "Not Guilty;" Meerloo's "Rape of the Mind;" and Borchard's "Convicting the Innocent"); and he urges that an effective way to avoid any physical or mental coercion upon a suspect under police investigation is to permit an attorney to be present during the police interrogation.

We take the positive position that in this case the petitioner was not subjected to any physical or mental coercion before or at the time of the taking of his confession; and on the question whether counsel should be permitted to be present during the police questioning and investigation, we incline to the New Jersey rule that the constitutional pro-

vision cannot be construed to mean that an accused has such right. As stated in *State* v. *Murphy, supra*, page 530:

> "• • • By no stretch of the imagination can the provision be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether or not he shall confess • • •."

Petitioner cites and quotes from *Williams* v. *Kaiser*, 323 U. S. 471, as well as an excerpt from the dissenting opinion in *Canizio* v. *New York*, 327 U. S. 82 (B. 17, 18), purportedly in support of his contention that an accused is entitled to the benefit of counsel not only at his trial but also during the police interrogation prior to his arraignment, which, he claims, is a "fundamental right." We do not consider those cases as supporting such a rule.

In *Williams* v. *Kaiser, supra*, the court failed to comply with defendant's request for assignment of counsel to defend him *at the trial*, and rather than go to trial without counsel he pleaded guilty. This was held to be a denial of due process because, as this Court pointed out, while a conviction based upon a guilty plea should not be lightly impeached, such a plea in a capital case must be given serious consideration where defendant *asked for counsel at the trial* and his request was not complied with by the court, especially where he was incapable of making his own defense.

The *Canizio* case, *supra*, would seem to support our contention. There a 19-year old defendant pleaded guilty to robbery, claiming he was not represented by counsel at the time of the plea and was not advised of his right to counsel. The State showed that an attorney had filed a "notice of appearance" in defendant's behalf two days before the

sentence, and this Court held that, "even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally;" that petitioner "actually had the benefit of counsel;" and when counsel took over the defense "he could have raised the question of a defect in the earlier part of the proceedings." (p. 453 bottom, to p. 454 of 66 S. Ct.)

The New Jersey rule laid down in *State* v. *Murphy*, 87 N. J. L. 515, *supra*, has been followed in several other jurisdictions.

In *State* v. *Sullivan*, 227 F. (2) 511 (10 Cir. 1955), two defendants, 19 and 21 years old, were convicted of murder in the Utah State court; their conviction was affirmed by the Utah Supreme Court; and certiorari was denied by this Court. Thereafter they sought and obtained a writ of habeas corpus in the U. S. District Court in which it was claimed that upon their arraignment before a committing Magistrate in the State Court they requested and were refused counsel on their preliminary hearing, the Magistrate having advised them that counsel would be furnished *at their trial*. The District Court upheld their contention, but the Court of Appeals reversed, holding that the right to aid and assistance of counsel guaranteed by the constitutional amendment "does not accrue until the indictment is returned or an information or other like charge is lodged against the accused." (Citing *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 S. Ct. 195; *Hauck* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116; and *Gilmore* v. *U. S.*, 129 F. (2) 199, cert. den. 317 U. S. 631, 63 S. Ct. 55). In reversing the District Court, the Court of Appeals pointed out that, at the hearing be-

fore the Magistrate the defendants did not enter any pleas of guilty; they did not testify; they made no confessions nor any incriminating statements before the Magistrate; and the failure to furnish them counsel at that time was not a prejudicial abridgement of their constitutional rights, the Court of Appeals stating that "The constitutional provision contains no express or implied command that an accused shall be furnished counsel at the preliminary hearing." This Court denied certiorari to review the judgment of the Court of Appeals. (See *Braasch and Sullivan*, v. *State of Utah*, 350 U. S. 973, 76 S. Ct. 449.)

In *People* v. *Crooker*, 303 P. (2) 753 (Cal. S. C. 1956), wherein this Court has granted certiorari to review the judgment of the California Supreme Court (354 U. S. 908, 77 S. Ct. 1300 certiorari granted June 10, 1957), defendant was convicted of murder in the first degree. At the trial he testified that following his arrest, while he was being questioned by police officers, he repeatedly requested the assistance of counsel but was informed he would be permitted to call an attorney as soon as the officers "were through with him." At the trial, the judge charged the jury that they could consider whether defendant was denied an opportunity to consult with his counsel on the question of the voluntariness of his confession. In rejecting the defendant's contention that the refusal to permit him to consult with his counsel during his interrogation by the police officers constituted a denial of due process, the Court very pointedly stated that, while an accused is entitled to the constitutional right to be represented by counsel in every stage of the proceedings, the denial "must have so fatally infected the regularity of his trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage

of justice;" and that the record disclosed that the police officers' conduct relative to defendant's request for an attorney in no way affected the voluntariness of defendant's confession.

In *State* v. *Rogers*, 120 A. (2) 409 (Conn. Sup. Ct. of Errors, 1956), in which this Court denied certiorari (351 U. S. 952, 76 S. Ct. 850, certiorari denied May 28, 1956), the facts and circumstances were far more grave than in the instant case. There the murder was committed on November 21, 1953. About 6 weeks later, on January 9, 1954, defendant was picked up by the police in another city upon a charge of burglary. Upon his arrest he engaged counsel (a Mr. Corse) to represent him on that charge. He was arraigned on the burglary charge on January 13, and remanded to jail in default of bail. On January 30, he was suspected of the murder of the previous November and taken from the jail to the State attorney's office where he was first advised of the murder and subjected to questioning. He immediately asked to see his lawyer (Mr. Corse) and his request was refused. He was subjected to continued questioning from 1:00 P. M. until the morning hours the following day. After the police threatened to take his sick wife into custody and turn his children over to the juvenile authorities, and the police pretended to make two telephone calls to put their threat into effect, defendant made a confession. He was returned to the jail on the morning of January 31. The coroner ordered the jailer to hold the defendant incommunicado and not to let his lawyer see him. When the lawyer arrived at the jail and requested to see the defendant, the sheriff called the State attorney and was advised not to allow the attorney to see the defendant under any circumstances. About noon police officers

arrived at the jail and questioned defendant over his lawyer's objections. Later the same afternoon defendant was taken to the coroner's office where defendant made further incriminating statements which were reduced to writing and signed by defendant, and they were introduced in evidence at his trial. In affirming the conviction the court stated that, even if all of the circumstances alleged by defendant were true, it would not, standing alone, render the confessions inadmissible, and unless the officers' conduct induced the defendant to confess *falsely*, their conduct did not vitiate the confessions.

Cases cited and quoted from on pages 21-22 of petitioner's Brief (*Williams* v. *Kaiser, supra; Uveges* v. *Pennsylvania*, 335 U. S. 437; *Hawk* v. *Olson*, 326 U. S. 271; and *White* v. *Ragen*, 324 U. S. 760) involved the lack of counsel *at the trial* and not during any pretrial interrogation of the defendant.

Williams v. *Kaiser* has been heretofore discussed. In *Uveges*, a 17-year old defendant under four charges of burglary was never informed of his right to counsel and he was never offered counsel at any stage of the entire criminal proceedings. He was induced to plead guilty upon the prosecuting attorney's promise that he would receive a Reformatory sentence but instead he was given a 20 to 40 year Penitentiary sentence, which was unquestionably a violation of due process. In *Hawk* v. *Olson*, the defendant was taken from Kansas to Nebraska; he was held incommunicado in jail where he was visited for 15 minutes by the Public Defender and his assistant who tried to intimidate him into pleading guilty, after which they left him saying they would have nothing to do with his trial. The follow-

ing morning defendant was arraigned on a charge of murder and he pleaded guilty without counsel; defendant requested a 24-hour adjournment of trial in order to consult with counsel and prepare his defense which was refused; his trial commenced without counsel and after two or three jurors were impaneled the Public Defender and his assistant stepped forward and entered the case; they never conferred with defendant before the trial, and the court never assigned any counsel to represent him; and after impaneling of the jury there was a recess of the trial until the following morning. This Court held there was a clear violation of due process. In *White* v. *Ragen, supra,* court-appointed counsel failed to confer with defendant until the case was called for trial and counsel told him he would do nothing unless defendant had some money. When defendant requested his counsel to call a certain witness in his behalf, counsel said he "did not have time" as he had another case in another court; counsel demanded that defendant plead guilty when the court refused to grant a continuance; when defendant made a request for a continuance of trial, the court told him to "keep still" as his attorney would do all the talking for him; and finally in despair the defendant entered a plea of guilty. This was held to be a lack of "effective" counsel, resulting in denial of due process.

Chandler v. *Fretag,* 348 U. S. 3, 75 S. Ct. 1 (1954), cited by petitioner (B. 22) did not involve the question of right to assistance of counsel between arrest and arraignment, but rather the trial court's refusal to grant the defendant his request for a continuance of the trial to permit him to engage counsel in his behalf and compelling the defendant to go to trial without counsel; and the circumstances of the

trial and entire proceeding (which took but 5 to 10 minutes) clearly smacked of denial of process.

In *Anderson* v. *Treat*, 172 U. S. 24 (1898) (B. 22), where the defendant was convicted of murder on the high seas and in a habeas corpus proceeding he claimed he was denied counsel at the time he told his story to a U. S. Marshal, this Court held that the conviction could not be collaterally attacked and a denial of a writ of habeas corpus was affirmed.

In *Canizio* v. *New York*, 327 U. S. 82 (B. 23), as hereinbefore pointed out, this Court held that the defendant "actually had the benefit of counsel" prior to sentence and there was no denial of due process.

In *Stroble* v. *California*, 343 U. S. 154, 72 S. Ct. 599 (1952), quoted from by petitioner (B. 23), the defendant was questioned in the district attorney's office in connection with a murder for almost an hour when an attorney who said he had been sent by defendant's son-in-law made a request to inquire of defendant personally as to his guilt of the crime and report it back to the son-in-law; and the attorney's request was refused. This Court held that the refusal was not a denial of due process "*either independently or in conjunction with all other circumstances in the case,*" such as, that defendant's interrogation took place in the presence of some nineteen persons connected with the district attorney's office and police department; that the district attorney allegedly inspired certain inflammatory newspaper reports prior to the trial; that defendant was without counsel at a sanity hearing; and that there was an unwarranted delay in defendant's arraignment.

The facts and circumstances in *U. S. ex rel. Caminito* vs. *Murphy*, 222 F. (2) 698 (2d Circ. 1955), cert. den. 350 U. S. 896, cited and quoted from (B. pp. 23-24), and strongly relied upon, are vastly different from those in the instant case. There the defendant was arrested on Sunday, May 11, 1941 at 6:00 P. M. and five or six officers questioned him from 9:00 P. M. until 2:00 A. M. the next morning, a period of five hours; he was then placed in a cell; he was given no bed, spring, or mattress and blankets, but compelled to sleep on a wooden bench. Questioning of defendant was resumed the next morning at 10:00 A. M. and continued all day. Members of his family, a friend, and an attorney who called at the police station and attempted to get information concerning defendant were refused any information; defendant was kept incommunicado and no one was permitted to see him until his arraignment about 40 hours after his arrest. Two female, and one male, detectives in disguise, on May 12, posed as witnesses purporting to identify the defendant as the person behind the wheel of the get-away car at the time of the stickup and shooting, whereas they were not witnesses at all and defendant was not told that they were detectives. Defendant signed confessions at about 9:00 P. M. of May 12 (27 hours after his arrest); and he was not arraigned until late the following day, May 13. Furthermore, the above facts *were not disputed by the State*. Besides, it was shown that under New York law a City Court was required to be open every day, including Sundays; a magistrate was always available; and there was no justification for the delay in arraignment. Under the facts and circumstances of that case, there was a clear denial of due process.

The case of *Fikes* v. *State of Alabama*, 352 U. S. 191, 77 S. Ct. 281 (1957) (a portion of the dissenting opinion being quoted from, B. 25), certainly does not support petitioner's contention that the refusal to permit a prisoner's attorney to see and consult with him while the prisoner is being questioned and investigated by the police prior to his arraignment constitutes a denial of due process. There the defendant's conviction for burglary with intent to rape followed by a death sentence resulted largely from what this Court said was a "totality of circumstances" leading to coerced confessions, such as, lack of education and low mentality of the accused; his arrest by civilians, lodgment in jail and his subsequent removal to a distant prison; his intermittent questioning for hours at a time over a period of 5 days prior to his first confession; keeping the defendant in isolation for an entire week; the continued questioning for several days before the second confession; and the denial of protection at a preliminary hearing contrary to State law. Under the circumstances of that case, this Court properly concluded that the pressure applied to the defendant, a person weak of mind and will, amounted to a denial of due process. The attorney attempted to see the petitioner about a week after the arrest, 2 days after the first confession and 3 days before the second confession.

Let us contrast the facts and circumstances in the *Fikes* case with those in the case at bar.

Here the petitioner was taken into custody on the morning of December 18 in Orange and he was immediately taken to Newark police headquarters at about 10:00 A. M. One of petitioner's confederates (Corvino) had been questioned in Newark headquarters on the preceding day, and

it was the information he had given the police which led to petitioner's apprehension. The other confederate (DeMasi) was taken into custody about the same time that petitioner was taken to Newark headquarters. There were only three police officers who participated in the questioning of the three men. There was no questioning of petitioner until "About 12:15 or 12:30 P. M." when Lieutenant Kinney talked with him "briefly and for about 20 or 25 minutes" (R. 96). DeMasi was questioned "around 1:30 or thereabouts" (R. 96). The next time petitioner was questioned was "about 3:15 or 3:30" for "forty-five minutes to an hour," at which time petitioner "changed his story after he was confronted by DeMasi" (R. 96.) Prosecutor's Detective Meagher first talked with DeMasi "about 1:35 until the neighborhood of 2:20," and then he took up the questioning of petitioner "about 3:15 P. M." and he continued the questioning "Until about 4:10" (R. 102). It was during this second questioning, after he was confronted by DeMasi, that petitioner gave an oral confession of the details of the crime participated in by all three men (R. 102-104). Prosecutor's Detective Meagher took petitioner's written confession from about 4:10 to shortly after 8:00 P. M.; Lieutenant Kinney took DeMasi's written confession; and Detective Norris took Corvino's written confession, the three written confessions being taken at about the same time on the fourth floor of Newark police headquarters. After petitioner's written confession was completed, he was interviewed by an impartial citizen-witness as to police treatment and petitioner acknowledged that there was no police mistreatment of any kind, saying it was "good or very good or words to that effect" (R. 98). Assistant Prosecutor McKeown, who was in and out of the

room at police headquarters while the questioning of the three men was in progress and while their written confessions were being taken, first saw petitioner's attorney (Mr. Palmieri) when he descended from the fourth floor at 4:46 P. M. (R. 114), and he informed the attorney that he would be able to see his client when the investigation was completed (R. 114).

It was not until the habeas corpus hearing in the District Court that petitioner complained of any alleged threats of violence by any of the officers. He made no complaint of any kind in any of the proceedings in the State courts, either at his arraignment on the murder charge the following morning, December 19, in the Magistrate's court, or in the County court when he was arraigned on the murder indictment or when he entered his plea of non vult, or when he was sentenced. He was represented by his counsel upon each and all of these occasions.

At the habeas corpus hearing in the District Court, any allegation by petitioner of any mistreatment was specifically and vigorously denied by the State witnesses (testimony of Prosecutor's Detective Meagher, Detectives Kinney and Norris of the Newark Homicide Squad, and Assistant Prosecutor McKeown).

It is of significance that petitioner's confession which he attacked in the Federal Court for the first time had never been used against him, sin he entered a plea of non vult; and there never was any trial. Had there been a trial, the State would have been prepared to show that his confession was given voluntarily.

As to petitioner's complaint that his attorney had not been permitted to see him while he was being questioned

and investigated in Newark headquarters, the attorney did see petitioner immediately upon completion of the investigation and signing of the confession; the same attorney represented him the following morning at the arraignment before the Magistrate; and the same attorney continued to represent him thereafter throughout every step of the criminal proceedings down to the entry of the non vult plea on March 26, 1951 and the imposition of sentence on April 18, 1951.

In re Groban's Petition, 352 U. S. 330, 77 S. Ct. 510 (1957), cited and quoted from (B. 25-27), does not support petitioner's contention. There a Fire Marshall, acting under an Ohio statute, conducted an investigation into the causes of a certain fire, and when certain witnesses refused to be sworn and testify before him unless they were represented by counsel, they were committed to jail. The question was whether the action of the Fire Marshall was a denial of due process. This Court concluded that, since the proceeding before the Marshall was not a criminal trial but merely a proceeding to elicit facts relating to the causes of the fire and to determine the existence of sufficient evidence upon which to base a formal charge of arson, the witnesses summoned were not entitled to the assistance of counsel.

We respectfully submit that in the instant case, particularly where the confession was in every respect a voluntary one and in accord not only with the State standards of voluntariness but with the constitutional requirements of fundamental fairness, the course followed by the police and prosecuting officials in refusing to permit counsel to see or consult with petitioner while he was in the process of being

questioned and investigated prior to his arraignment was in strict conformity with the time-honored principles of New Jersey law firmly established in the New Jersey cases of *State* v. *Murphy, supra,* and adhered to in *State* v. *Cole, State* v. *Bunk* and *State* v. *Grillo,* heretofore referred to, to the effect that an accused's constitutional right to counsel contemplates the aid and assistance of counsel for his *defense at his trial,* and not during the period between his arrest and arraignment.

POINT II.

The refusal of the State courts to allow a pre-trial inspection of petitioner's confession did not contribute to any alleged "unfairness" in the proceedings.

Petitioner was taken into custody on the morning of December 18, 1949, and at about 10:00 A. M. he was turned over to the Newark police for questioning and investigation.

The actual questioning of petitioner did not commence until all three of the men were in custody. Petitioner was first questioned by Lieutenant Kinney who questioned him briefly for 20 to 25 minutes, and petitioner was returned to a cell. The next questioning of petitioner was not resumed until about 3:15 P. M. when he was questioned for 45 minutes to one hour. Up to that time he maintained his innocence, but upon being confronted by DeMasi, he "changed his story." Prosecutor's detective Meagher questioned him from 3:15 to 4:10 P. M., and it was during this interview that petitioner gave Meagher a full account of the details of the crime and of his participation in the crime

and that of his confederates (Corvino and DeMasi). (See R. 103-104).

The writing of petitioner's confession was not begun until about 5:17 P. M. and completed at about 8:10 P. M., after which the citizen-witness inquired of petitioner relative to the police treatment, and petitioner made no complaint about police treatment.

Petitioner's counsel (Mr. Palmieri) made a request to see petitioner of Assistant Prosecutor McKeown at about 4:46 P. M., which was after petitioner had given an oral statement to Prosecutor's detective Meagher but before the writing of the confession.

Petitioner's counsel was permitted to see his client soon after 9:00 P. M., after the writing of the confession was completed and after the inquiry by the citizen-witness (Taylor).

On March 3, 1950, before any trial of the indictment, petitioner's attorney made application to the County Court for an inspection of petitioner's confession as well as his co-defendants' confessions, advancing as his grounds the claim that it had been obtained while petitioner was under arrest without complaint or warrant, that at the time of his confession he had not been advised of his constitutional rights, and because he had been denied counsel while he was under police interrogation.

The County Court denied the application in its entirety. (R. 36); and on appeal the Appellate Division of the New Jersey Superior Court rejected petitioner's contentions and dismissed the appeal. (*State* v. *Cicenia*, 9 N. J. Super. 135, R. 37-40.)

The New Jersey Supreme Court affirmed with modification (*State* v. *Cicenia*, 67 N. J. 296, 78 A. 2d 568), and it held that an accused does not have the absolute right to a pre-trial inspection of his confession but such an application is addressed to the sound judicial discretion of the trial court to be exercised only as the interest of justice may require, with the thought in mind that the admissibility of a confession is always a matter for determination if and when offered at the trial; that an accused has no right to suppression of his confessions before trial; and that he has no right to inspection of the confessions of his co-defendants.

The New Jersey rule is consistent with that of other jurisdictions. (*State* v. *Haas*, 188 Md. 63, 51 A. 2d 647, Ct. App. 1947; *People* v. *Skoyec*, 50 N. Y. S. 2d 438, Sup. Ct. 1944; *State* v. *Leland*, 190 Ore. 598, 227 P. 2d 785, Sup. Ct. 1951, aff'd 343 U. S. 790, 72 S. Ct. 1002).

In a later New Jersey case, *State* v. *Tune*, 13 N. J. 203 (Sup. Ct. 1953), the rule in the *Cicenia* case, *supra*, was reaffirmed, and this Court denied certiorari. See *Tune* v. *New Jersey*, 349 U. S. 907, 75 S. Ct. 584).

What the New Jersey Supreme Court said in the *Tune* case, 13 N. J., on page 218, is most appropriate here:

> "We can well understand the desire of defense counsel to see the confession in every case particularly where the defendant after having made the confession finds on reflection it is better for himself to forget it. But the wishes and convenience of defense counsel are not the test * * *."

Petitioner refers to the rule in Louisiana (*State* v. *Dorsey*, 207 La. 928, 22 So. 2d 273) (B. 30), that the refusal to

furnish the defense with a copy of defendant's confession is per se a violation of due process. Careful reading of that case will disclose, first, that the conclusion was grounded upon a particular set of facts which existed in that case, and secondly, Louisiana happens to be the only state, within our research, to maintain such rule.

The Louisiana rule was flatly rejected by the Oregon Supreme Court in *State* v. *Leland,* 190 Ore. 598, 227 P. 2d 785 (Sup. Ct. 1951); and this Court affirmed the judgment in the Oregon case in *Leland* v. *State of Oregon,* 343 U. S. 790, 72 S. Ct. 1002 (1952), wherein it is stated (p. 1009 of 72 S. Ct.):

> "• • • While it may be the better practice for the prosecution thus to exhibit a confession, failure to do so in this case in no way denied appellant a fair trial. The record shows that the confession was produced in Court five days before appellant rested his case. There was ample time both for counsel and expert witnesses to study the confession. In addition the trial judge offered further time for that purpose but it was refused. There is no indication in the record that appellant was prejudiced by the inability of his counsel to acquire earlier access to the confession."

In the instant case, petitioner's confession was never used because there was no trial. He admitted his guilt in open court when he retracted his original plea of not guilty and entered a plea of non vult upon the advice and with the consent of his counsel, the confession being taken on December 18, 1949, and his plea of non vult being entered on March 26, 1951 (after a lapse of 15 months).

Under this point, petitioner lays stress upon the dissenting opinion in the New Jersey case of *State* v. *Tune, supra,* (B. 29), and he cites and quotes from various law reviews and discussions which tend to disagree with the New Jersey rule in *Tune* that an accused has no absolute right to a pre-trial inspection of his confession, his argument being that, when the factor of the refusal of counsel during the police interrogation is coupled with the factor that petitioner was refused a pre-trial inspection of his confession, there is a resultant denial of due process, with which we cannot agree.

As we pointed out under our Point I, the refusal to permit counsel to consult with his client while petitioner was under police interrogation and investigation was in strict conformity with the established law of New Jersey under the New Jersey cases of *Murphy, Cole, Bunk* and *Grillo,* hereinbefore discussed.

As we have pointed out under this point, the refusal to permit counsel to inspect petitioner's confession before trial was also in accordance with the New Jersey rule first laid down in *State* v. *Cicenia,* 6 N. J. 296, *supra,* and since reaffirmed in *State* v. *Tune,* 13 N. J. 205, in which this Court denied certiorari in *Tune* v. *New Jersey,* 349 U. S. 907, 75 S. Ct. 584.

Therefore, under these circumstances, how can it be said that by joining the two factors (refusal of counsel during police interrogation, and refusal of pre-trial inspection of confession), where each of the factors was in conformity with New Jersey law and this Court has not as yet disagreed with either of the two rules, necessarily spell out such a "fundamental unfairness" to petitioner as to amount to a denial of due process under the Fourteenth Amendment?

As to the complaint that petitioner was not permitted to see his counsel while he was under police interrogation, it is significant that petitioner had the benefit of his counsel from the time the confession was completed on the evening of December 18, 1949 down through every step of the criminal proceedings to the time of his sentence on April 18, 1951.

And as to the complaint that petitioner was denied a pre-trial inspection of his confession, we cannot see how he was in any way prejudiced by such denial, since he would have been given ample opportunity to make a collateral attack upon his confession had he seen fit to go to trial on the merits. But this he did not do.

In the instant case, other than petitioner's present claim that the refusal of counsel during his police interrogation and the refusal of a pre-trial inspection of his confession, when viewed together, resulted in prejudice, we find nothing in the record to indicate that petitioner was in any way prejudiced to the extent that he was denied due process of law.

POINT III.

Petitioner's confession was a voluntary statement under State law, and it was obtained in accordance with the requirements of fundamental fairness under the Fourteenth Amendment; and since the confession was never used against petitioner because of his plea of non vult, and since the plea was entered voluntarily and understandingly upon the advice and with the consent of his attorney, petitioner was not denied due process.

The gist of petitioner's argument under this point seems to be, briefly, that the confession was extorted from him by the police at a time when his attorney was denied access to him; and, since he was induced to plead non vult to the indictment because of the existence of the confession, he was denied due process, with which we cannot agree.

It is the respondent's contention, first, that the confession was not extorted from him but given voluntarily in accordance with State law on admissibility, and obtained in compliance with the requirements of fundamental fairness under the 14th Amendment; and secondly, since the State made no use of the confession because petitioner entered a plea of non vult to the indictment, and since the plea was entered voluntarily and understandingly upon the advice and with the consent of counsel, petitioner cannot claim any denial of due process.

(a.) Petitioner's confession was given voluntarily in accordance with State law on admissibility, and in compliance with the requirements of fundamental fairness under the 14th Amendment.

At the hearing on habeas corpus in the District Court, petitioner testified to certain acts of violence, threats and

abuse allegedly perpetrated by police officers during his interrogation and investigation on December 18 in Newark police headquarters (R. 70-73).

In cross examination, he named the officers who questioned him (Assistant Prosecutor McKeown and Detectives Kinney, Norris, Meagher and Gross) (R. 77), that the "beating" was by uniformed policemen committed in the presence of Kinney, Norris and Meagher but not in the presence of the Assistant Prosecutor (R. 79-80); and when asked as to their identity he said, "I wouldn't be able to pick them out" (R. 78).

The State specifically and directly contradicted each and every statement of petitioner with regard to his alleged police mistreatment.

Lieutenant Kinney testified that petitioner was given food "around 1 o'clock" (R. 96); that petitioner had not been subjected to any abuse or any threats or physical violence by anyone (R. 97); Detective Meagher of the Prosecutor's staff for over 27 years testified that petitioner was not subjected to any abuse or threats or violence (R. 106), that petitioner at first gave him an oral account of the details of the crime and the part played therein by each of the three participants (R. 103-104), that the 7-page written confession was based upon the information which petitioner had given, saying, "I questioned Mr. Cicenia and the answers I put down in this form" (R. 105), that it took from 5:17 P. M. to about 8:10 P. M. to write the confession in longhand (R. 105), that he read the confession to petitioner and petitioner himself read it aloud (R. 105), that petitioner signed each and every page (R. 105), and that petitioner was afterwards questioned by a disinterested citizen-

witness (Mr. Taylor) as to police treatment and petitioner acknowledged he had been treated properly (R. 105-106).

Assistant Prosecutor McKeown and Detective Norris also testified and corroborated Kinney and Meagher in every detail in respect to the voluntariness of the confession and the fair treatment of the officers.

It is the established rule in New Jersey that to be admissible a confession must be proven to have been freely and voluntarily given, and that it cannot be induced by hope or fear or other considerations leading to substitution of something else than the truth. (*State* v. *Rios*, 17 N. J. 572, 599-601, S. C. 1955; *State* v. *Walker*, 15 N. J. 485, S. C. 1954; *State* v. *Grillo*, 11 N. J. 173, S. C. 1952).

We respectfully submit that in the instant case the confession was not only in accord with the New Jersey rule of admissibility, but it was procured by means strictly in conformity with the standards of "fundamental fairness" required by the Fourteenth Amendment of the Federal Constitution. (Cf. *Watts* v. *Indiana*, 338 U. S. 49, 93 L. Ed. 1801; *Harris* v. *South Carolina*, 338 U. S. 68, 93 L. Ed. 1440, 1949; *Turner* v. *Pennsylvania*, 338 U. S. 62, 93 L. Ed. 1810, 1949).

Here it cannot be said that the confession was the result of continuous, prolonged questioning and grilling by relays of officers under conditions and circumstances determined by this Court in the *Watts*, *Harris* and *Turner* cases, *supra*, to be improper and oppressive and violative of the rule of "fundamental fairness."

It is to be noted that the only police officials and officers who undertook the investigation and questioning of not

only the petitioner but of his two confederates were an Assistant Prosecutor (McKeown), a Prosecutor's detective (Meagher), and two detective members of the Newark Homicide Squad (Kinney and Norris).

The record does not support petitioner's claim of police brutality, and his testimony was abundantly contradicted by the State witnesses in every detail.

(b) The State made no use of the confession because petitioner entered a plea of non vult to the indictment; and since the plea was entered voluntarily and understandingly upon the advice and with the consent of counsel, petitioner cannot claim denial of due process.

As we have pointed out under subdivision (a) of this Point, it was established by the State at the hearing on the writ in the District Court by the greater weight of the evidence that petitioner's confession was given freely and voluntarily and that it was procured by means consistent with constitutional standards of "fundamental fairness."

If petitioner had gone to trial he could have attacked the legality of his confession and the State would have been required to establish its voluntariness as a prerequisite to its admissibility in accordance with State law and that it was procured by means consonant with due process.

However, petitioner chose not to go to trial and some 15 months after the taking of the confession he entered a plea of non vult to the indictment in open court in the presence and upon the advice and with the consent of his counsel.

We respectfully submit that under these circumstances, in view of petitioner's plea of non vult, there was no longer any need for use of the confession and the trial judge ac-

quired the necessary jurisdiction to impose an appropriate sentence.

We respectfully submit, too, that under such circumstances the petitioner could not thereafter make any proper and legitimate attack upon his confession by way of habeas corpus proceedings.

In the case of *In re Domako*, 20 N. J. Super. 314, 90 A. 2d 30 (N. J. App. Div. 1952), aff'd 11 N. J. 591, 95 A. 2d 505 (N. J. S. C. 1953), the defendant pleaded guilty to four indictments and was given a prison sentence. Thereafter he applied for habeas corpus, claiming, as one of his grounds, his unlawful detention for seven days following his arrest and before he was arraigned; that during the detention he was subjected to continued questioning and physical force which led to the giving of his confession. His contention was rejected because "*he pleaded guilty and if confessions were made by him, no use was ever made thereof*" (p. 316 of 20 N. J. Super.), and that under such circumstances the defendant could not invoke the rule that in order to be admissible the confession must be shown to have been voluntarily given.

A Federal case in point is *Trowbridge* v. *Pennsylvania*, 112 F. Supp. 356 (D. C. 1952), aff'd 204 F. 2d 689 (3d Circ. 1953). There the defendant pleaded guilty to two counts of a 3-count indictment. On habeas corpus, he claimed that, (1) he had been severely beaten by the police and forced to sign a confession; and (2) he had been "tricked" by his attorney into offering a guilty plea. His contentions were rejected because he failed to sustain his claim of denial of constitutional rights in the habeas corpus proceedings in the State courts, and the record clearly sup-

ported the State courts' conclusion that there had been no denial of his constitutional rights. The Federal court particularly emphasized the point that because of his pleas his confession had not been used against him when it stated (p. 357 of 112 F. Supp.):

> "But even if petitioner had been beaten to extract the confession, he would not be entitled to the writ, for *the confession was not used against him* * * *." (Emphasis supplied.)

The court considered of significance the period of time that elapsed from the time he gave his confession to the time he entered his pleas, as follows (p. 357 of 112 F. Supp.):

> "* * * Also petitioner alleges that he was beaten on April 21, 1951. He was sentenced on June 25, 1951 which is over two months after the alleged beating. Thus any duress which might have been used and we do not find this to be the fact, had ceased before petitioner was taken to court to sign the plea of guilty."

This is how the Court disposed of his contention of "trickery" of his counsel (See notation No. 3):

> "The plea was signed in the presence of petitioner's counsel which further negatives the averment of duress. The allegation that petitioner's counsel tricked him into signing a plea does not raise a federal question. Even if it were true, it would not stamp the sentence as a farce and mockery of justice." (Citing cases).

This was the situation in the instant case. Petitioner was taken into custody on the morning of December 18, 1949. His confession was taken in the afternoon and early

evening of the same day. The following morning, December 19, 1949, at about 11:00 A. M., he was taken before the Magistrate for arraignment on the criminal complaint. At the arraignment he was represented by his counsel and a plea of not guilty entered. It was not until March 26, 1951, more than 15 months after the confession, after his counsel had unsuccessfully undertaken various appeals in the State courts from the trial judge's denial of his request for a pre-trial inspection of his confession, that petitioner retracted his plea of not guilty and substituted a non vult plea to the indictment which was done in the presence of, and upon the advice and with the consent of his counsel.

We respectfully submit that under these circumstances, there was abundant time afforded to petitioner to reflect and understand the nature and consequence of his plea, and that he should not thereafter be permitted to attack the legality of his confession, which was never used against him, by means of habeas corpus proceedings.

U. S. ex rel. Brink v. *Claudy*, 96 F. Supp. 220 (D. C. Pa. 1951), aff'd 194 F. 2d 535, rehearing denied 102 F. Supp. 802, aff'd 200 F. 2d 699, cert. den. sub nomine *Brink* v. *Pennsylvania*, 345 U. S. 930, 73 S. Ct. 792, is a good case in point. There the defendant was arrested without warrant, placed in a cell and held incommunicado and brutally beaten for the purpose of obtaining his confession. It was held that issuance of a writ of habeas corpus was not justified *"where no confession had been received or offered in evidence."* Cases of similar import are *U. S.* v. *Gallagher*, 183 F. 2d 342; *U. S.* v. *Payne*, 183 F. 2d 415, cert. den. 340 U. S. 913, 71 S. Ct. 283; *Holly* v. *Pennsylvania*, 81 F. Supp. 861, aff'd 174 F. 2d 480; *Waley* v. *Johnston*, 139 F. 2d 117, cert.

den. 321 U. S. 779, 64 S. Ct. 617, rehear. den. 321 U. S. 804, 64 S. Ct. 845.

The facts and circumstances of *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 76 S. Ct. 223 (1956), upon which petitioner strongly relies (B. 35), are so strikingly at odds with those in the instant case that the case cannot serve as any advantage to petitioner. There the defendant had never had the benefit of counsel *at any stage of the proceedings*; he was without counsel upon his arraignment, and he was without counsel when he entered his guilty pleas to 30 charges. Further, the prosecuting attorney subjected him to great pressure by demanding that petitioner "sign your name (to the pleas) and forget it." It is most significant, too, that all of petitioner's allegations contained in his petition were *undisputed* by the State.

That is not the situation here. If petitioner had gone to trial and there attempted to attack the legality of his confession the State would have been prepared to show that the confession was given freely and voluntarily and by means of fundamental fairness. But petitioner avoided a trial by pleading nor vult and the confession was never used against him.

At no time did petitioner make any attempt to attack his confession in the State courts. It was not until he instituted habeas corpus proceedings in the Federal District Court that he made an attack upon his confession by claiming it had been extorted by the police. And at the hearing in the District Court the State vigorously disputed his claim by submitting abundant evidence of all of the police officers and prosecuting officials involved to show that the

confession was freely and voluntarily given and that it was procured by fundamentally fair means.

In contrast with the *Herman* v. *Claudy*, case, *supra*, the petitioner in the instant case had the benefit of counsel from the evening of December 18, 1949, immediately following the taking of his confession, throughout every step of the criminal proceedings until he was sentenced on April 18, 1951.

Conclusion.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the Court below should be affirmed.

Respectfully submitted,

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